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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Developing a Unified Intercarrier
Compensation Regime

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) CC Docket No. 01-92
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)

COMMENTS OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

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The Cellular Telecommunications & Internet Association (“CTIA”)’ hereby submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.²

I. INTRODUCTION

The problems of LEC-CMRS interconnection compensation predate the passage of the Telecommunications Act of 1996 (“1996 Act”), and remain in need of substantial reform. The Commission’s plenary jurisdiction to undertake this reform is well-established under both agency and judicial interpretations of section 332; this jurisdictional grant greatly simplifies and

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, **ESMR**, as well as providers and manufacturers of wireless data services and products.

² Developing a Unified Inter-carrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, FCC 01-132 (rel. Apr. 27, 2001) (“Notice”).

obviates the thorny legal questions raised in the Notice by reference to sections 251 and 252.

The Commission can and should exercise its section 332 jurisdiction to order bill and keep for LEC-CMRS interconnection at a single point of interconnection.

Bill and keep will far more readily send efficient market signals for the costs of interconnection, and thereby enhance consumer welfare. For LEC-CMRS interconnection, bill and keep need not be complicated. The modified versions of bill and keep, including the two OPP proposals discussed in the Notice, should be rejected for LEC-CMRS interconnection since they would re-introduce many of the same problems already associated with positive pricing under the current regime.

The Commission should make clear that CMRS providers are entitled to request a single point of interconnection within a LATA (and after section 271 authority is obtained, within a MTA) in a bill and keep regime. Absent Commission rules that maintain this right, ILECs would be able to manipulate the locus and the costs of interconnection.

In addition, the Commission can act immediately to reaffirm CMRS providers' right to collect access charges from long distance carriers under the current rules or any subsequent rules adopted to govern exchange access. Also, in light of recent abuses of existing rules conducted by certain rural LECs that needlessly raise the cost of providing CMRS services, the Commission should reaffirm the rights of CMRS providers to be free of such distortions.

Finally, any action the Commission may take with respect to virtual NXXs should not apply to CMRS providers. Virtual NXXs have been used by CMRS carriers for many years to ensure that wireline subscribers do not have to pay toll charges when making local calls to CMRS subscribers. **Any** concerns the Commission may have with respect to CLEC abuses of virtual NXXs are not applicable to CMRS.

II. THE COMMISSION HAS PLENARY AUTHORITY UNDER SECTION 332 OF THE ACT TO ORDER BILL AND KEEP FOR LEC-CMRS INTERCONNECTION.

In the Notice, the Commission requests comment on its statutory authority to adopt bill and keep for LEC-CMRS interconnection.³ Specifically, the Commission seeks comment on the extent of its authority under section 332 of the Communications Act of 1934, as amended (“Act”), and whether rules governing LEC-CMRS interconnection should be adopted pursuant to section 332, or under a different provision of the Act.⁴

Section 332 grants the Commission plenary authority to adopt a bill and keep regime for LEC-CMRS interconnection. Although the Commission recognized but declined to exercise this authority in 1996, the extent of its section 332 jurisdiction has been clarified over the past five years. It is now clear that the Commission can and should use section 332 to regulate LEC-CMRS interconnection rates, and adopt a bill and keep regime that will promote “the efficient use of, and investment in, telecommunications networks, and the efficient development of competition,” as intended by Congress.⁵

The Commission also seeks comment on any overlap between the processes for LEC-CMRS interconnection provided in section 332, and those provided in sections 251 and 252.⁶ The Commission need not exercise its authority under both of these provisions to adopt bill and keep for LEC-CMRS interconnection. The Commission’s authority under section 332 is separate and unique from both its own authority and state authority granted pursuant to sections

³ Notice, ¶ 85

⁴ Id., ¶ 90.

⁵ Id.

⁶ Id., ¶ 89.

251 and **252**. There is no overlap or conflict between these provisions that prevents the Commission from moving forward under section 332.⁷ Thus, the Commission can immediately set rates for LEC-CMRS interconnection without conflict with state authority or agreements reached pursuant to sections **251** and **252**.

If the Commission concludes, however, that its authority to adopt bill and keep for all carriers is somehow limited by sections **251** and **252**, it retains plenary authority under section **332** to separately adopt bill and keep for LEC-CMRS interconnection. Sections **251** and **252** do not limit the Commission's exercise of its section **332** authority, nor, as explained below, did Congress intend that the **1996** amendments to the Act do so. Thus, any exercise of Commission jurisdiction under section **332** is distinct from and not affected by sections **251** and **252**. The Commission has already recognized as much. Before the D.C. Circuit, the Commission recently argued that

section **332** independently empowers the Commission to adopt rule 51.703(b) for CMRS providers [which forbids LECs from charging paging companies for carrying and completing LEC originated calls]. ...Thus, the Court can -- and should -- uphold the authority of the Commission to adopt and enforce [this rule] without reaching the LECs' claims that the Commission lacks such authority under sections **251** and **252**.⁸

⁷ To the extent the Commission believes that there is some overlap between these provisions, it has raised the possibility of forbearing from applying sections **251** and **252** to LEC-CMRS interconnection. *Id.*, ¶¶ 88-89.

⁸ Brief for Respondent at 31, *Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) (Nos. 00-1376 and 00-1377).

A. Section 332 Provides The Jurisdictional Basis For The Commission To Adopt Bill And Keep To Ensure The Continued Growth Of An Efficient, Competitive, Nationwide CMRS Market.

In 1993, when Congress amended section 332 of the Act in the 1993 Budget Act,⁹ it intended to promote a uniformly-regulated, efficient, competitive CMRS market. For this reason, Congress charged the Commission with implementing regulatory policies that foster the full development of the CMRS market. Congress explicitly envisioned that this process could evolve to CMRS providers acting as competitors to the local loop, with minimal state regulation.¹⁰

The legislative history of the 1993 amendments demonstrates that Congress believed that LEC-CMRS interconnection was an important issue that should be regulated by the Commission, not the states. The importance of LEC-CMRS interconnection is emphasized in the legislative history of section 332(c)(1)(B), which reiterates the authority that the Commission already possessed under section 201 to order interconnection. The House Report states that:

⁹ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(B)(2)(B), 107 Stat. 312 (1993) (“1993 amendments” or “section 332 amendments”).

¹⁰ Section 332 contains examples of Congress’ recognition of and providing for competitive entry by CMRS carriers into the local exchange market. See, e.g., 47 U.S.C. § 332(c)(3)(A); H.R. Conf. Rep. No. 103-213, at 493 (1993) (“Conference Report”) (noting that “the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. **If**, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, ... it is not the intention of the conferees that States should be permitted to regulate these competitive services...”).

In other words, Congress specifically recognized, and approved *of*, wireless carriers providing “basic telephone service” in competition with wireline carriers, and only reserved the states’ authority to regulate the rates charged by wireless carriers in the provision of such service if the wireless carrier was the sole local exchange services provider in the relevant geographic market.

Section 332(c)(1)(B) provides that the Commission shall order a common carrier to establish interconnection with any person providing commercial mobile service, upon reasonable request. Nothing here shall be construed to expand or limit the Commission's authority under section 201, except as this paragraph provides. **The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network.'**¹¹

Thus, in amending section 332 Congress intended that the Commission have express authority to order LEC-CMRS interconnection. By simultaneously preempting state authority to regulate CMRS rates and entry, Congress empowered the Commission to order physical interconnection and set the rates for providing it. The relationship between the Commission's authority to order interconnection and its authority to set rates for interconnection is inseparable as "[t]he availability of interconnection cannot . . . be divorced from its price."¹² Moreover, Congress intended that the Commission retain this authority to regulate **CMRS** carriers even if they become competitors in the local loop.¹³

¹¹ H.R. Rep. No. 103-111, at 261 (1993) ("House Report") (emphasis added). Section 332(c)(1)(B) provides: "Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this Act. . . . [T]his subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act." 47 U.S.C. § 332(c)(1)(B).

¹² Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers, CC Docket Nos. 95-185, 94-54, *Notice of Proposed Rulemaking*, 11 FCC Rcd 5020, ¶ 10 (1996) ("LEC-CMRS Interconnection NPRM").

¹³ In commenting upon the states' authority to regulate CMRS providers for universal service concerns, Congress provided that:

Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of

In recognition of the interstate nature of mobile services and the federal interest in fostering nationwide, seamless wireless networks, Congress preempted state regulation of CMRS rates and entry.¹⁴ As the Commission and courts have recognized, the Commission's rate regulation authority includes authority to set interconnection rates.¹⁵ Specifically, section 332(c)(3)(A) provides in relevant part:

Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.¹⁶

telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. 47 U.S.C. § 332(c)(3)(A).

The Commission has since clarified that this limits state authority to regulate CMRS rates for universal service purposes to those instances where CMRS is a substitute for land line service. Petition of Pittencrieff Communications, Inc. for Declaratory Ruling Regarding Preemption of the Texas Public Utility Regulatory Act of 1995, File No. WTB/POL 96-2, **Memorandum Opinion & Order**, 13 FCC Rcd 1735 (1997). However, as the Conference Report clarified, it was not Congress' intent that states regulate CMRS generally, but rather that the Commission retain plenary jurisdiction over CMRS. See supra, n. 10.

¹⁴ See 47 U.S.C. § 332(c)(3)(A); see also House Report at 260 ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.").

¹⁵ See, e.g., Iowa Utils. Bd. v. FCC, 120 F.3d 753, 800 n.21 (8th Cir. 1997), *aff'd in part, rev'd in part*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) (concluding that the Commission has plenary authority to establish interconnection pricing rules for LEC-CMRS interconnection); Implementation of Sections 3(n) and 332 of the Communications Act. Regulatory Treatment of Mobile Services, GN Docket No. 93-252, **Order**, 15 FCC Rcd 5231, ¶ 2 n.6 (2000) (observing that section 332 extends to CMRS interconnection rates).

¹⁶ 47 U.S.C. § 332(c)(3)(A).

Thus, the statute provides that states have no authority over rates charged by CMRS providers, nor can states regulate CMRS entry. Moreover, in 1993, Congress also amended section 2(b) to create an exemption for the Commission's authority under section 332(c)(1)(B), thereby ensuring that the Commission has the jurisdiction to order interconnection rates for both interstate and intrastate LEC-CMRS interconnection.¹⁷

The 1993 amendments underscore Congress' intent that CMRS spectrum be fully utilized (i.e., evolve to its best and highest use), free of any state barriers. The passage of the 1996 Act did not alter Congress' intent in this regard, and it is indisputable that section 332 remains in full force even after the passage of sections 251 and 252.¹⁸ Nothing in the language of sections 251 and 252 derails the Commission's authority under section 332 to set rates for LEC-CMRS interconnection. Accordingly, the processes established under these two provisions are separate, and allow the Commission to establish bill and keep for LEC-CMRS interconnection under section 332 in furtherance of the competitive, deregulatory policy goals established by Congress in 1993.

¹⁷ 47 U.S.C. § 152(b) states: "Except as provided in sections 223 through 227 of this title, inclusive, and section 332, ... nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier..."

This exemption, along with section 332, further demonstrates that Congress could not have intended that the 1996 Act eliminate or narrow the Commission's authority or to give states jurisdiction over LEC-CMRS interconnection rates.

¹⁸ See Section 601(c)(1) of the 1996 Act ("This [1996] Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.") Pub. L. No. 104-104, § 601(c), 110 Stat. 56, 143 (1996).

B. Since The Passage Of The 1996 Act, The Commission's Section 332 Authority Has Been Clarified And Confirmed.

Since the passage of the 1996 Act, and the Commission's adoption of the Local Competition Order,¹⁹ courts and the Commission have clarified the Commission's authority to adopt rates for LEC-CMRS interconnection under section 332. These decisions demonstrate that, under section 332, the Commission has plenary jurisdiction to regulate LEC-CMRS interconnection rates, and this authority is neither in conflict with nor constrained by sections 251 and 252

In the Local Competition Order, the Commission adopted interconnection regulations and set interconnection rate mechanisms for all carriers under its section 251 and 252 authority. The Commission also noted, however, that its decision to promulgate rules regarding LEC-CMRS interconnection under sections 251 and 252 did not limit its section 332 jurisdiction over LEC-CMRS interconnection.²⁰ In addition to the authority granted by sections 251 and 252, the Commission found section 332 to be an alternative basis for jurisdiction over LEC-CMRS interconnection: "section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time."²¹

The Commission also concluded that LECs are obligated to enter into reciprocal compensation arrangements with CMRS providers for the transport and termination of traffic on

¹⁹ Implementation of the Local Competition Provisions in the Telecomms. Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98, 95-185, *First Report and Order*, 11 FCC Rcd 15,499 (1996) ("Local Competition Order").

²⁰ See *id.*, ¶ 1023.

²¹ *Id.*

each other's networks.²² The Commission found that its authority to require LEC-CMRS reciprocal compensation arrangements was derived from section 251(b)(5) and the corresponding pricing standards of section 252(d)(2). The Commission articulated that, as CMRS providers offer telephone exchange service and exchange access, incumbent LECs must make interconnection available to these CMRS providers in conformity with sections 251(c) and 252, thereby requiring reciprocal compensation.²³ Again, while finding that sections 251 and 252 authorized LEC-CMRS reciprocal compensation, the Commission recognized that section 332 could provide the Commission with jurisdiction as well.²⁴ It maintained that, "[b]y opting to proceed under sections 251 and 252, the Commission is not finding that section 332 jurisdiction over interconnection has been repealed by implication, and the Commission acknowledges that section 332, in tandem with section 201, is a basis for jurisdiction over LEC-CMRS interconnection."²⁵ Thus, by proceeding under sections 251 and 252 to adopt the rules for LEC-CMRS interconnection, the Commission's jurisdiction under section 332 was not fully considered.

The Court of Appeals for the Eighth Circuit clarified and more firmly established the Commission's unique section 332 jurisdiction over CMRS interconnection and rates.²⁶ In Iowa

²² See id.

²³ See id.

²⁴ See id.

²⁵ Id.

²⁶ Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part*, AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) ("Iowa Utilities"). Note that although the Supreme Court later reversed parts of the Eighth Circuit's decision, the court's holding with respect to the Commission's section 332 jurisdiction was not addressed, and thus remains valid precedent. See Qwest v. FCC, 252 F.3d 462, 466 (D.C. Cir. 2001) (holding

Utilities, the Eighth Circuit vacated parts of the Commission's Local Competition Order on the grounds that the Commission had exceeded its jurisdiction under sections 251 and 252 by setting interconnection rates.²⁷ The court premised its jurisdictional findings on both sections 251 and 252 and an analysis of section 2(b) of the Act.²⁸ The court preserved, however, the Local Competition Order's "rules of special concern to the CMRS providers."²⁹ Specifically, the court upheld the Commission's regulations establishing symmetrical reciprocal compensation pricing arrangements for transport and termination of traffic between LECs and CMRS providers, as well as CMRS providers' right to renegotiate existing, non-reciprocal transport and termination arrangements -- pricing arrangements that the court believed the Commission lacked jurisdiction to adopt for LECs, but has jurisdiction to adopt for CMRS interconnection.

The court determined that Congress expressly created an exemption for section 332 in section 2(b) for regulation of CMRS providers. The court reasoned that since the section 2(b) reservation of authority to the states does not apply, the Commission, not the states, has the ultimate authority to establish interconnection pricing rules between LECs and CMRS providers. Significantly, the court observed that Congress amended section 2(b) to give the Commission jurisdiction over entry and rates charged by CMRS providers.³⁰ Moreover, the court recognized

that a loser's failure to appeal a judgment "left him as badly off as if he had appealed and lost," meaning that the Eighth Circuit's holding on section 332 was considered "a final judgment with preclusive effects.") (citing Angel v. Bullington, 330 U.S. 183, 189 (1947)).

²⁷ Iowa Utilities 120 F.3d at 794.

²⁸ 47 U.S.C. §§ 152(b), 251, 252.

²⁹ Iowa Utilities 120 F.3d at 800 n.21.

³⁰ See id.

that Congress provided express Commission authority to regulate LEC-CMRS interconnection under section 332(c)(1)(B).³¹ Thus, the court concluded that federal regulation of CMRS rates and entry is a function of the Commission's plenary authority over communications by wire and communications by radio and not subject to the rigors of a section 2(b) analysis.

The court's interpretation of the Commission's broad authority under section 332 reveals two important points. First, the court recognized that section 332's grant of authority to the Commission over CMRS rate and entry regulation is plenary. Second, section 332 plays the paramount role in governing CMRS rate and entry regulation notwithstanding the subsequent amendments to the Act. Thus, to the extent that the Commission considers delaying industry wide adoption of bill and keep, section 332 provides an avenue for the Commission to move to bill and keep for LEC-CMRS interconnection immediately.

Since the Eighth Circuit's decision in Iowa Utilities, the Commission has asserted its authority under section 332 in a more definitive manner. In an order last year, which denied several petitions for reconsideration of the Second Report and Order in the CMRS interconnection and resale obligations proceeding, the Commission confirmed its conclusion that section 332(c)(3)'s "preemption of state rate regulation extends to CMRS interconnection rates."³² Separately, the Commission recently concluded that the term "information access" in

³¹ See id.

³² See Implementation of Sections 3(n) and 332 of the Communications Act. Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Order*, 15 FCC Rcd 5231, ¶ 2 n.6 (2000) (upholding a Commission order in which it concluded that it had authority under section 332 to order mutual compensation for call termination as well as the authority to prohibit LECs from price discrimination between CMRS providers for LEC-CMRS interconnection. Implementation of Sections 3(n) and 332 of the Communications Act. Regulatory Treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order* 9 FCC Rcd 1411, ¶¶ 232-233 (1994) ("CMRS Second Report and Order"). The Commission further noted its intent to initiate a proceeding that could "mandate specific

section 251(g) encompasses ISP-bound traffic, but that “this traffic is excepted from the scope of the ‘telecommunications’ subject to reciprocal compensation under section 251(b)(5).”³³ The Commission further determined that those telecommunications that are subject to the requirements of section 251(b)(5) include all telecommunications not excluded by section 251(g).³⁴ The Commission was careful to note, however, that the exchange of traffic between LECs and CMRS providers must be analyzed differently due to the Commission’s unique section 332 jurisdiction.³⁵ Thus, although section 251(g) limits the scope of the Commission’s authority to order interconnection under section 251(b)(5), it does not affect the Commission’s separately established jurisdiction in section 332 over LEC-CMRS interconnection rates.

Additionally, in AirTouch Cellular v. Pacific Bell, the Commission reiterated the source of its statutory authority to adopt section 20.11 of its rules. Under section 20.11(b)(1), the relevant provision in this case, “[a] local exchange carrier shall pay reasonable compensation to a commercial mobile service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.”³⁶ The Commission concluded that section 20.11 applies

tariff rate elements” for LEC-CMRS interconnection. Id., ¶ 235 n.479. Of course, before that proceeding was concluded, the 1996 Act was passed and the Commission instead elected to go forward under sections 251 and 252, but clearly it recognized at that time its authority to set the rates for LEC-CMRS interconnection.).

³³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, *Order on Remand and Report and Order*, 16 FCC Rcd 9151, ¶¶ 44, 47 (2001).

³⁴ Id., ¶ 46.

³⁵ Id., ¶ 47 (noting the Commission’s discussion of its section 332 jurisdiction in the Local Competition Order).

³⁶ See AirTouch Cellular v. Pacific Bell, File No. E-97-46, *Memorandum Opinion and Order*, FCC 01-194, ¶¶ 9-11 (rel. July 6, 2001). Note that the LEC-CMRS mutual

to both interstate and intrastate interconnection rates, and that its authority to adopt the rule stems from section 332, which specifically preempted “state regulation of entry and rates for CMRS providers.”³⁷

The D.C. Circuit has also recently reaffirmed the Commission’s jurisdiction over CMRS interconnection rates pursuant to section 332, and relied upon the Eighth Circuit’s holding in Iowa Utilities for support. In Qwest Corp. v. FCC,³⁸ the court addressed whether the Commission had authority to enforce section 51.703(b) of its rules, which forbids LECs from charging paging companies for carrying and completing LEC originated calls. The Commission enforced this rule through adjudication of complaints brought by paging carriers under section 208, while the LECs objected, arguing that under section 251(c)(1) of the Act such disputes can only be resolved through state managed negotiation and arbitration.

The Commission argued that it has jurisdiction to resolve these complaints under section 332. The issue before the court was whether section 51.703(b), as applied to CMRS, was derived solely from the 1996 Act, or whether it is validated by section 332 of the Act, which was amended three years prior. The court observed that if the rule relied upon section 332, then the Commission undisputedly has jurisdiction to adjudicate section 208 complaints alleging violations of section 51.703(b). The court determined that this precise issue had been resolved by the Eighth Circuit in Iowa Utilities, thus it saw no need to re-examine the issue. It understood the Eighth Circuit as holding that section 332 gives the Commission the authority to order LECs

compensation requirement was adopted in 1994, pursuant to section 332, well before section 251(b)(5) was amended by Congress.

³⁷ Id., ¶¶ 8-9

³⁸ 252 F.3d 462 (D.C. Cir. 2001).

to interconnect with CMRS carriers, and “to issue rules of special concern to the CMRS providers, i.e., 47 C.F.R. ss 51.701, 51.703...”³⁹

The D.C. Circuit’s decision eliminates any ambiguity with respect to the Eighth Circuit’s holding. In holding that Iowa Utilities precluded relitigation of this issue, the D.C. Circuit reinforced the validity of the Commission’s authority to regulate LEC-CMRS interconnection rates under section 332 of the Act. Accordingly, the Eighth Circuit’s holding in Iowa Utilities should continue to be the guiding principle for resolution of CMRS jurisdiction issues. These cases, combined with the Commission’s decisions, thus confirm the Commission’s independent, plenary authority under section 332 to set rates for LEC-CMRS interconnection.

Even if the Commission decides, however, to regulate interconnection for all carriers under the umbrella of its section 251 and 252 jurisdiction, it should affirmatively recognize its plenary authority under section 332 to separately regulate LEC-CMRS interconnection. As explained, the Eighth Circuit, and more recently the D.C. Circuit, have clearly articulated the Commission’s section 332 jurisdiction, and the Commission should take this opportunity to affirmatively define and assert this authority. Further, by recognizing its section 332 jurisdiction, the Commission will be able to mandate bill and keep for LEC-CMRS interconnection without delay and ensure that the adoption of bill and keep for LEC-CMRS interconnection would withstand judicial scrutiny.

III. BILL AND KEEP IS THE MOST EFFICIENT POLICY CHOICE FOR LEC-CMRS INTERCONNECTION.

As the Commission has long recognized, markets operate most efficiently when prices are set equal to marginal cost. As the Commission has also recognized, interconnection prices

³⁹ Iowa Utilities 120 F.3d at 800 n.21

are currently not set at marginal cost. The current regime produces both static and dynamic inefficiencies, causing industry, consumers, and taxpayers to incur additional costs that could be avoided. **As** the Commission considers how to reduce these substantial distortions, it must acknowledge that any theoretically “perfect” model -- which has in any event not been reached -- cannot be implemented in practice. **As** discussed below, the “perfect” model would have to account for peak load costs and other factors simply beyond administrative practicalities. While any pragmatic solution will likely introduce some inefficiency, the Commission must not let the “best become the enemy of the good.”⁴⁰

An optimal model for compensation would have a number of characteristics. First, it must account for the asymmetrical bargaining power that prompts the need for regulatory intervention. Second, the model should approximate the actual underlying costs of the interconnection services provided. Third, it must impose minimally necessary administrative costs, for both implementation and enforcement of the regulations. By pursuing and achieving these objectives, the optimal model also serves the Commission’s goal to remain competitively and technologically neutral.

A. Market Failure Requires Continued Commission Regulation.

The Commission must be credited for taking responsibility and action in an area that plainly requires its intervention. In a competitive market, carriers would achieve efficient solutions to compensate each other for the termination of their traffic. Although each carrier has

⁴⁰ MCI Telecomms. Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1988) (concluding that “[t]he best must not become the enemy of the good, as it does when the FCC delays making any determination while pursuing the perfect tariff.”). The concept of the perfect as the enemy of the good is originally drawn from Voltaire’s comment about dramatic art in his *Philosophical Dictionary* of 1764. See William Safire on Language, N. Y. TIMES, Mar. 3, 1996, § 6, at 34.

the incentive to push as much of the interconnection costs as possible onto the other interconnecting carrier, balanced bargaining positions lead to an efficient result. Regulation would not be necessary in such a market, Regulation ~~is~~ necessary in the case of ILEC-CMRS interconnection for one straightforward reason. Incumbent local exchange companies, due to their uniquely ubiquitous networks, bring to the negotiating table far greater leverage than do CMRS companies wishing to interconnect with them. Consumers generally find value in a telecommunications service for the ability to both place and receive calls. Because most consumers remain ILEC customers, interconnection with ILEC networks remains far more important to CMRS providers than the obverse.

This asymmetry gives the ILEC superior bargaining power. Absent regulation, the imbalance at the negotiating table can lead to inefficient outcomes that reduce consumer welfare. First, the ILEC may be able to extract rents in interconnection agreements by overcharging the CMRS provider or by refusing to pay amounts that permit the CMRS provider to recover its costs. Second, through either payment or other terms, the ILEC may utilize interconnection in strategic ways that disrupt the development of competitive markets.

There can be no doubt, then, that regulation is necessary for the foreseeable future for ILEC interconnections with new entrants, including CMRS providers. Absent regulation, market outcomes would reflect existing market failures and competition would falter and perhaps even fail.

These observations are hardly hypothetical. The early years of cellular interconnection reflected substantial interconnection problems for these new networks. Incumbents refused to provide interconnection on terms and conditions that would permit efficient entry. Among other things, they charged cellular companies for wireless calls terminating on the landline network

and often charged them for landline-to-wireless traffic as well. At the same time, ILECs refused to compensate cellular companies for landline-to-wireless calls. These problems prompted Commission intervention in 1987, requiring ILECs to compensate cellular companies for terminating traffic. In 1993, the Commission again acted with its new expanded federal jurisdiction over such matters and reiterated this ILEC obligation and extended it to intrastate traffic as well.⁴¹ Concerned again in 1995 that violations of these policies were occurring broadly, the Commission initiated a rulemaking to consider the adoption of national uniform transport and termination terms for LEC-CMRS interconnection.⁴² The Commission ultimately chose to fold in CMRS issues with the broader local interconnection issues in its Local Competition Order

B. The Current Regime Of Reciprocal, Symmetrical Compensation Is Inefficient In The CMRS Context.

Regulation, if not carefully tailored, may itself introduce inefficiency. The Notice discusses at length these problems. First, as the Notice explains, when regulation prompts similar services to be priced differently, the opportunity for regulatory arbitrage occurs. Faced with inefficient prices, firms will make inefficient decisions to substitute services priced above costs for the services priced below costs.⁴³ Second, and as again the Notice details, because the termination of local calls has been priced distinctly from terminating access services, distortions exist here as well. Because interexchange carriers must purchase access from the end user's local carrier, that local carrier has the ability to price access above costs without losing its end

⁴¹ See CMRS Second Report and Order, ¶¶ 232-235.

⁴² See generally LEC-CMRS Interconnection NPRM.

⁴³ Notice, ¶¶ 11-12.

user.⁴⁴ This in turn has prompted the Commission, as an interim measure, to create an additional regulatory apparatus to regulate those access prices directly.⁴⁵ Inefficient interconnection prices, as the Notice details, introduce a variety of additional problems, including the need to account for networks (such as CMRS) whose network costs and cost structures vary significantly from ILEC networks, distortions in the structure of end user prices, and distortions in subscription choices.

The Notice flows from the Commission's recognition that the current regulatory scheme departs substantially from the optimal model.⁴⁶ The problems created by the current regime in the specific context of LEC-CMRS interconnection are readily identifiable and confirm the Notice's discussion. Today's regulatory scheme for LEC-CMRS interconnection compensation results in interconnection price inputs that are both inefficiently high and low, that is, above and below cost, in turn distorting retail prices. For traffic originating on the wireless network and terminating on the landline network, the CMRS provider pays transport and termination comparable to landline CLECs. Because they fail to account for peak and off peak usage, these highly averaged rates for transport and termination do not reflect the actual costs of providing these services. Further, analysis of the underlying costs imposed by CMRS-originated calls terminating on landline networks demonstrates that these calls do not cause landline networks to incur peak usage costs. For calls that originate on the landline network and terminate on the wireless network, the wireless carrier historically has been unable to recover its actual costs of termination from the ILEC and further, was forced to pay the ILEC a charge for originating the

⁴⁴ Id., ¶ 13.

⁴⁵ See generally Local Competition Order.

⁴⁶ Notice, ¶¶ 11-18.

call. Further, ILECs have attempted to exploit ostensible ambiguities in the current rules to try to undercompensate CMRS providers for terminating costs. Even where the obligation of the ILEC to compensate the CMRS company has been fully (and expensively) litigated,⁴⁷ thereby entitling the CMRS provider to a fully symmetrical compensation, it has become clear that this symmetry nevertheless fails to adequately compensate the CMRS provider. Because of their architecture, CMRS carriers confront different cost structures and higher traffic sensitive costs in terminating calls handed off to them by other networks. The presumption of symmetrical rates based upon the ILEC's cost of terminating calls present in today's rules effectively has deterred CMRS providers from collecting their appropriate costs of terminating landline traffic.⁴⁸ Thus the current regime fails to meet each of the three goals of an optimal scheme.

In contrast to these problems, calls that originate on one CMRS network and terminate on another's without being switched through the public switched network are governed by a bill and keep regime, reflecting the efficient market outcome of a competitive market with balanced bargaining power. Similarly, neighboring ILECs with co-equal bargaining power have traditionally negotiated bill and keep arrangements for handing off traffic to one another. The fact that these types of agreements provide for bill and keep suggests strongly that this method is an efficient means of ensuring compensation.

⁴⁷ See Cost-Based Terminating Compensation for CMRS Providers, CC Docket Nos. 95-185, 96-98; WT Docket No. 97-207, *Sprint PCS Reply Comments*, at 5-7 (filed June 13, 2000).

⁴⁸ As explained below, one CMRS provider, Sprint PCS, has initiated efforts to recover its additional costs for terminating LEC originated traffic under the Commission's Rules. See *Notice*, ¶ 16.

C. The Commission Should Move Forward And Adopt Bill And Keep For LEC-CMRS Interconnection.

The Notice seeks comment on the possible adoption of bill and keep, or some variant on bill and keep. In 1995, the Commission proposed bill and keep for LEC-CMRS interconnection. But, when the Commission first established its broader local interconnection rules for presumed symmetrical rates, it expressed broad efficiency concerns for bill and keep. As the Notice explains, “under traditional analyses of intercarrier compensation” bill and keep is considered inefficient because there are positive costs to terminating calls, and bill and keep sets the price at zero.⁴⁹ Second, the Commission has previously ruled that bill and keep would not be appropriate in instances where traffic flows were imbalanced.⁵⁰ At that time, ILECs had expressed fears that CLECs would seek out customers with particular traffic patterns that would exploit the bill and keep arrangement. Of course, as the Notice details, that is precisely what has happened anyway under symmetrical reciprocal compensation, with large volumes of CLEC traffic terminating in ISPs whose traffic is predominantly one-way.

Although the Commission conceded in 1996 that bill and keep might be a more efficient method specifically for LEC-CMRS interconnection, it declined to mandate it. First, the Commission noted that traffic between LECs and CMRS providers appeared substantially imbalanced; CMRS carriers (at that time, almost exclusively cellular) originated far more calls than they terminated. While it accepted in concept the proposition that this imbalance would be offset by higher CMRS termination costs, it noted that no record evidence was submitted to document the higher CMRS costs imposed by wireline calls. Thus, notwithstanding

⁴⁹ Id., ¶ 20.

⁵⁰ Local Competition Order, ¶ 1116.

acknowledgment that bill and keep might be particularly appropriate for LEC-CMRS interconnection, the Commission decided to lump in CMRS with all other local interconnection.

CTIA urges the Commission to return to its initial views that bill and keep is the appropriate method for ILEC-CMRS interconnection.⁵¹ Bill and keep is by far the most administratively simple method, removing the need to engage in lengthy and costly proceedings to derive regulated prices. It sends economically efficient pricing signals given the combination of two factors: the balance of traffic flows in LEC-CMRS interconnection and the higher terminating costs incurred by CMRS networks. By requiring bill and keep at a single point of interconnection, the Commission would preclude the ILEC from charging excessive rates and from being able to refuse to pay compensatory rates to CMRS providers, while avoiding sending inefficient signals to the market regarding the locus of interconnection.

Recognizing the substantial benefits of bill and keep, the Notice offers the two alternatives set forth in OPP papers written nearly exclusively in the context of wireline interconnection compensation issues. These papers are designed to capture the benefits of bill and keep while attempting to avoid the potential inefficiencies. But the desire to foreclose these perceived inefficiencies unfortunately results in methods that change only the nominal nature of the disputes and problems that have arisen under symmetrical compensation; they by no means eliminate them.

First, it must be recognized that neither COBAK nor Atkinson-Barnekov truly reduces the administrative costs of establishing compensation rates. In the case of Atkinson-Barnekov, the debate is simply moved to the illusory pursuit of quantifying the incremental costs imposed by interconnection. The Commission's experience with cost allocation in the

⁵¹ See LEC-CMRS Interconnection NPRM, ¶¶ 61-62.